Canada Industrial Relations Board Conseil canadien des relations industrielles

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# Reasons for Decision

Mr. Brian Cadieux,

*applicant,*

*and*

Amalgamated Transit Union, Local 1415,

*respondent,*

*and*

Greyhound Canada Transportation Corp.,

*employer.*

Board File: 29669-C
Neutral Citation: 2013 CIRB **676**
February 27, 2013

The Canada Industrial Relations Board (the Board), composed of Ms. Elizabeth MacPherson, Chairperson, and Mr. William G. McMurray and Ms. Louise Fecteau, Vice-Chairpersons, considered this application for reconsideration.

**Parties' Representatives of Record**

Mr. Olivier Laurendeau, for Mr. Brian Cadieux;

Mr. G. James Fyshe, for the Amalgamated Transit Union, Local 1415;

Mr. David Butler, for Greyhound Canada Transportation Corp.

## I–Nature of the Application

[1] The Board has before it an application for reconsideration filed on October 18, 2012, pursuant to section 18 of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*). Mr. Brian Cadieux (the applicant) is asking that the Board reconsider the decision issued on September 21, 2012, in *Cadieux*, 2012 CIRB 656 (*Cadieux 656*). In that matter, the applicant alleged that the Amalgamated Transit Union, Local 1415 (the ATU or the union) had violated section 37 of the *Code* with respect to the handling of his suspension and termination grievances. In its decision, the Board dismissed the duty of fair representation complaint against the union.

[2] The applicant requested an oral hearing in connection with the application for reconsideration. The Board notes in this regard that section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Furthermore, the Board does not normally hold oral hearings in the context of reconsideration applications (see *NAV CANADA*, 2000 CIRB 88). In this matter, the Board is satisfied that the parties' written submissions are sufficient for it to decide the matter without holding an oral hearing.

## II–Background and Facts

[3] The applicant worked for Greyhound Canada Transportation Corp. (Greyhound or the employer) for approximately two and one half years. He drove buses from Greyhound's terminal in Montréal.

[4] In June 2010, he received a five-day suspension. The reason given by the employer was that the applicant had improperly logged his hours of work. The union filed a grievance on September 6, 2010. The union obtained a settlement and the applicant was reimbursed for five days pay on November 2, 2011.

[5] On April 20, 2011, Greyhound terminated the applicant's employment, again alleging violations in logging hours of work. The union filed a grievance to contest the termination.

[6] The union was unable to resolve the matter concerning the termination grievance and had to decide whether or not to refer it to arbitration. According to the union's internal procedure, the union's executive board first had to decide whether or not to recommend arbitration, and then the matter had to be put to a vote by secret ballot by the union membership in the bargaining unit concerned. In its decision, the panel that heard the applicant's complaint set out the grievance process described by the union:

> [24] The ATU described the process it followed when deciding whether to take a grievance to arbitration. The ATU's Executive Board (EB) initially decides whether to recommend that the matter be taken to arbitration pursuant to article 7*b* of its Bylaws:
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> > 7. GRIEVANCES
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> > ...
> >
> > b. At the last step of the grievance procedure and prior to the membership voting on arbitration, the member will present his case to the Executive Board, orally or in writing, at their regular meeting. Should the member not make a presentation to the Executive Board, the Executive Board will render it=s [*sic*] recommendation based on the evidence on file.
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> [25] The ATU membership then votes whether to send a grievance to arbitration, as provided by article 7c of the Bylaws. Arbitration votes for Mr. Cadieux's bargaining unit take place only in Toronto, London and Ottawa:
>
> > 7. GRIEVANCES
> >
> > ...
> >
> > c. The membership will vote by secret ballot at the general meetings as to whether to proceed to arbitration on any grievance involving the interest of an individual member. A simple majority will rule. **Arbitration votes will be held only in the cities of Toronto, London and Ottawa for the Greyhound bargaining unit**. Arbitrations for Barrie Transit will be held in Barrie. Arbitrations for other bargaining units will be discussed by the Executive Board and the Executive Board shall have final say where the vote will be held. Only members of the bargaining unit affected may vote on the arbitration.
> >
> > (emphasis added)

[7] In its decision, the panel that considered the complaint noted the different versions presented by the parties regarding the process followed by the union with respect to the union meetings at which the applicant's termination grievance was considered. The meetings in question were held on June 1, 2011 (meeting of the executive board) and June 15, 2011 (vote by the union membership in Ottawa).

[8] The applicant alleged that he had not been properly informed of these two meetings. The union contended that, despite being notified, the applicant had declined to participate

in the executive board process or attend the meeting at which the membership had voted on the referral of the grievance to arbitration.

[9] Faced with this contradiction, the original panel had directed one of the Board's industrial relations officers (IRO) to conduct an investigation pursuant to section 16(*k*) of the *Code*. Under that provision, the Board may delegate certain powers, including the power to conduct investigations, to any person.

[10] The IRO conducted the requested investigation and submitted a report to the Board and all the parties on March 8, 2012. The investigation focused on three aspects:

1. notification of the applicant by the union in regard to the process for determining whether or not his termination grievance would be referred to arbitration
    a. the meeting of the union's executive board on June 1, 2011
    b. the meeting of the membership to vote on arbitration, held in Ottawa on June 15, 2011;
2. review of the email communications;
3. review of the circumstances surrounding the recording of certain events.

[11] All of the parties had the opportunity to make submissions regarding the report, which was produced in both official languages. The applicant in fact sent his submissions in this regard on March 15, 2012.

[12] The original panel subsequently dismissed the applicant's complaint. In its decision, the Board accepted the union's explanation that it had informed the applicant in several ways of the executive board meeting of June 1, 2011, in accordance with article 7(*b*) of the union's bylaws. The Board accepted the union's evidence that it had emailed and spoken to the applicant regarding this subject. The email address used by the union to contact the applicant was a point of disagreement between the parties. The applicant contended that he had no knowledge of the address used. However, the original panel decided that it was not necessary to determine whether the applicant had received the union's email in order to decide the matter.

[13] The panel found that the applicant had not attended the executive board meeting or filed any submissions for that meeting. It also accepted the union's submission that it had tried to call the applicant during the meeting of June 1, 2011, but that no one had answered the telephone. At that meeting, the executive board decided not to recommend referring the applicant's termination grievance to arbitration.

[14] With regard to the meeting of June 15, 2011, in Ottawa, at which the union membership voted on arbitration, the Board found that the applicant had failed to attend the meeting despite having been informed of the meeting well in advance.

[15] The original panel found that the union had respected its obligations with regard to the applicant's suspension and termination grievances. It accordingly dismissed the complaint. Its reasons read in part as follows:

> [46] Mr. Cadieux' complaint referred to two separate grievances he had filed. The first contested a five-day suspension, while the second contested the termination of his employment in April, 2011. Mr. Cadieux had the burden of proof to convince the Board that the ATU had violated section 37 of the *Code* in handling one or both of these matters.
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> ...
>
> [53] The IRO Report provided sufficient information to satisfy the Board that Mr. Cadieux was aware of the ATU's upcoming arbitration vote process regarding his termination grievance. ...
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> ...
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> [58] In these circumstances, Mr. Cadieux knew of the meetings. The ATU had also followed a similar arbitration vote process earlier, which had resulted in Mr. Cadieux's five-day suspension grievance being sent to arbitration.
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> ...
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> [64] For the above reasons, the Board dismisses Mr. Cadieux's complaint.

## III–Positions of the Parties

### A–The Applicant

[16] The applicant, represented by counsel, is asking that the Board reconsider and rescind its decision of September 21, 2012. He is also seeking an order by the Board that a hearing be held as soon as possible on the original matter, before a panel other than the one that made the decision he is seeking to have reconsidered.

[17] The applicant submits that the information in the report produced by the IRO assigned by the Board was obtained outside the presence of the parties from people who were not under oath. In his view, the information obtained was contradictory and not of a nature to allow the Board to arrive at a decision. The applicant states that the Board could not determine the matter without some means to assess the evidentiary weight of the conflicting versions presented by the parties and it should consequently hold a hearing in the presence of the parties.

[18] He refers in this regard to the decision of the Federal Court of Appeal in *Grain Services Union (ILWU-Canada)* v. *Freisen*, 2010 FCA 339, in which the Court indicated that the discretion of the Board under section 16.1 of the *Code* regarding when it will hold an oral hearing is very wide, but is not absolute.

[19] The applicant categorically denies having received an email from the union in which it advised him of the meeting of the executive board on June 1, 2011, contrary to what the union president told the IRO during the latter's investigation. He submits that the email address is not the one the union normally used to contact him.

[20] According to the applicant, this disputed issue is central to the decision that the Board had to make, since the union's bylaws provide that a grievor will present his case to the executive board. He submits that he did not have the opportunity to present his case to the executive board because he was never informed of the meeting of June 1, 2011. In his view, a hearing should have been held in regard to this matter, to allow each party to present the evidence it deemed relevant. Witnesses would then have been under oath and could have been cross-examined by the opposing party.

[21] The applicant also alleges that the Board refrained from addressing the question of whether the union had met its duty to properly notify him in good time of the meeting of the executive board. He submits that the Board based its decision to dismiss the complaint solely on the fact that he had not attended the first of three membership meetings at which a vote had been held on the referral of his termination grievance to arbitration.

[22] The applicant states that the IRO Report noted conflicting explanations regarding his absence at the time of the membership vote in Ottawa. He submits once again that the Board should have held a hearing to allow each party to call its witnesses and to cross-examine the opposing party's witnesses in order to shed light on the issue.

[23] With regard to the tape recording of the meeting of June 15, 2011, the applicant argues that because the Board had not listened to the recording and ruled that it did not need to deal with the objection raised by the union concerning the admissibility of such evidence, the Board prematurely deprived itself of evidence, the relevance and evidentiary weight of which it failed to consider.

[24] With regard to the grievance relating to the five-day suspension, the applicant alleges that the IRO Report contains no information in that regard and that the Board's decision to dismiss the complaint on this issue was based on mere allegations. He further submits that the facts concerning the grievance relating to the five-day suspension are relevant for assessing the union's conduct in regard to his termination and its refusal to refer his termination grievance to arbitration.

[25] The applicant submits that the Board failed to consider the union's conduct and ignored what he sees as collusion between the employer and the union representatives with respect to the outcome of his two grievances. In his reply to the union's response, the applicant states, among other things, that the errors alleged in his application for reconsideration do not relate primarily to the IRO Report, but to the decision itself.

[26] Finally, the applicant requests that the Board excuse his failure to file his application for reconsideration within 21 days of the date the decision was issued, as required by the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*). The applicant submits in this regard that he attempted to retain the services of a lawyer to handle the matter, but was initially unsuccessful. He subsequently found counsel, who explained that he had exercised due diligence right from the time he had met with the applicant, but had been unable to file the application for reconsideration before October 18, 2012.

**B – The Union**

[27] The union submits that the applicant has not substantiated his allegations that the Board failed to consider the facts or his submissions or failed to correctly apply the law or its own jurisprudence.

[28] The union submits that the applicant has not met any of the criteria set out in section 44 of the *Regulations* respecting reconsideration of a decision by the Board. More particularly, it argues that the applicant has not alleged the existence of new facts that, had they been brought to the attention of the Board before it made its decision, would likely have caused the Board to arrive at a different conclusion, within the meaning of section 44(*a*) of the *Regulations*. It further submits that the applicant has failed to show a violation of section 44(*b*) of the *Regulations*, pertaining to errors in law or policy that cast serious doubt on the Board's interpretation of the *Code*.

[29] According to the union, the grounds cited by the applicant in his application for reconsideration relate to principles of natural justice, since he alleges that his complaint could not be determined by the Board until a hearing was held into the issue of notification of the union meetings involving his grievance. The union argues that, under section 16.1 of the *Code*, the Board may decide any matter before it without holding an oral hearing.

[30] The union argues that, when the parties are given the opportunity to make submissions and file relevant evidence and the Board exercises its discretion to assign an investigating officer to the matter to obtain more information regarding certain contradictory submissions, the Board's decision to dismiss the complaint without holding an oral hearing should not normally be rescinded and should not be deemed contrary to principles of natural justice.

[31] In the union's view, it was appropriate for the Board to assign an IRO to question different people and summarize the information provided by the parties. It argues that the IRO produced a suitable report and the parties had the opportunity to make submissions regarding its contents.

[32] The union submits that the applicant admitted to having been informed of the meeting of the union membership in Ottawa on June 15, 2011, when the membership voted on referring his termination grievance to arbitration. It argues that those meetings were critical, since the union's executive board did not have the authority to make a final decision on the matter. It submits that, despite the fact that the complainant was informed of the meeting in Ottawa, he chose not to attend.

[33] Finally, the union submits that the applicant's application was filed beyond the 21-day time limit for filing a reconsideration application provided for under section 45(2) of the *Regulations*, since the Board issued its decision on September 21, 2012, and the application for reconsideration was not filed until October 18, 2012.

**C–The Employer**

[34] The employer did not file any submissions respecting the application for reconsideration filed by the applicant.

**IV–Analysis and Decision**

**A–Relevant Statutory Provisions**

[35] At the time that the application for reconsideration was filed on October 18, 2012, the statutory and regulatory provisions relevant to the instant matter read as follows:

> *Canada Labour Code*
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> 16. The Board has, in relation to any proceeding before it, power
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> ...
>
> (*f*) to make such examination of records and such inquiries as it deems necessary;
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> (*k*) to authorize any person to do anything that the Board may do under paragraphs (*a*) to (*h*), (*j*), or (*m*) and to report to the Board thereon;
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> (*m*.1) to extend the time limits set out in this Part for instituting a proceeding.
>
> 16.1 The Board may decide any matter before it without holding an oral hearing.
>
> 18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.
>
> 22.(1) Subject to this Part, every order or decision of the Board is final and shall not be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(*a*), (*b*) or (*e*) of that Act.

37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

*Canada Industrial Relations Board Regulations, 2001* (the *Regulations*)

44. The circumstances under which an application shall be made to the Board exercising its power of reconsideration under section 18 of the *Code* include the following:

(*a*) the existence of facts that were not brought to the attention of the Board, that, had they been known before the Board rendered the decision or order under reconsideration, would likely have caused the Board to arrive at a different conclusion;

(*b*) any error of law or policy that casts serious doubt on the interpretation of the *Code* by the Board;

(*c*) a failure of the Board to respect a principle of natural justice; and

(*d*) a decision made by a Registrar under section 3.

45. ...

(2) The application must be filed within 21 days after the date the written reasons of the decision or order being reconsidered are issued.

46. The Board may vary or exempt a person from complying with any rule of procedure under these Regulations — including any time limits imposed under them or any requirement relating to the expedited process — where the variation or exemption is necessary to ensure the proper administration of the *Code*.

**B–Timeliness of Application for Reconsideration**

[36] At the time the application for reconsideration was filed by the applicant, section 45(2) of the *Regulations* provided that an application for reconsideration had to be filed within 21 days after the date the reasons for the decision being reconsidered were issued. However, section 16(*m*.1) of the *Code* and section 46 of the *Regulations* provide that the Board may extend the time limit for filing such an application.

[37] In *VIA Rail Canada Inc.*, 2007 CIRB 381, the Board explained the circumstances that might warrant an extension of the time limit for filing a reconsideration application:

[35] Section 45(2) of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*), provides that an application for reconsideration must be filed within 21 days after the date the written reasons of the decision or order being reconsidered are issued. One of the principal reasons for establishing a time limit is to facilitate access to the Board's review process while preserving the need for finality of its decisions.

[36] Notwithstanding the 21-day time limit, the Board has the power to grant an extension of that time limit, pursuant to section 16(*m*.1) of the *Code*. It has exercised this power on reconsideration applications in exceptional circumstances only—for example, in a case where the applicant alleged substantial or serious grounds warranting review (*Wholesale Delivery Service (1972) Ltd.* (1978), 32 di 239; and [1979] 1 Can LRBR 90 (CLRB no. 154)), and

where there would be no prejudice caused to the other party if the extension was granted (*British Columbia Telephone Company* (1979), 38 di 124; [1980] 1 Can LRBR 340; and 80 CLLC 16,008 (CLRB no. 220); and *Robert Adams*, [2001] CIRB no. 121). The Board has refused to grant an extension of the time limit to file for reconsideration in cases where the applicant did not act with diligence in filing the application (*Canadian Broadcasting Corporation* (1994), 93 di 214 (CLRB no. 1056)), or where the applicant did not provide sufficient reasons to extend the time limit (*Société Radio-Canada*, [2002] CIRB no. 184; and 92 CLRBR (2d) 83; and *Cargill Limited*, [2001] CIRB no. 117).

[38] In the instant matter, the applicant normally should have filed his application for reconsideration at the latest on October 12, 2012. However, he did not file the application until October 18, 2012. Given that the applicant explained that there were exceptional circumstances, in that he had been unable to find counsel within the time limit set and that the counsel whose services he had retained had been unable to gather the information required in time to file an application for reconsideration by October 12, 2012, the Board grants the applicant's request for an extension of the time limit. The Board finds that the applicant acted with sufficient diligence to warrant an extension of six days and is satisfied that such an extension will not prejudice the union. The Board also notes that, as of December 18, 2012, the deadline for filing applications for reconsideration has been increased to 30 days (see the *Canada Industrial Relations Board Regulations, 2012*, section 45(2)). In the Board's view, the grounds relied upon for the reconsideration application warrant consideration of the matter by the Board. The Board therefore exercises its discretion pursuant to section 16(*m*.1) of the *Code* to extend the time limit prescribed for filing the application for reconsideration.

**C–The Application for Reconsideration**

[39] After carefully considering the parties' submissions, the Board has decided to dismiss the application for reconsideration, for the reasons set out below.

[40] Under section 18 of the *Code*, the Board has the discretion to review a decision, including for the grounds set out in section 44 of the *Regulations* as it was in force at the time the applicant filed his application for reconsideration. It should be noted that section 44 of the *Regulations* was repealed in December 2012 as a result of concerns that this regulation potentially fettered the broad discretion given to the Board by section 18 of the *Code*.

[41] The finality of its decisions is of primary concern to the Board. Section 22 of the *Code* provides that every decision of the Board is final. The Board's power of reconsideration must accordingly be exercised circumspectly and as an exception rather than the rule (see *591992BC Ltd.*, 2001 CIRB 140; and *Kies*, 2008 CIRB 413). Although such power allows the Board to correct egregious errors, it is not intended to be an appeal process, nor is it meant to be used to re-argue issues already determined. In a reconsideration matter, the Board must show deference to the panel that determined the complaint and must refrain from substituting its own assessment of the facts for that of the panel that heard the complaint (see *Williams* v. *Teamster Local Union 938*, 2005 FCA 302).

[42] In the instant matter, the Board is of the view that the panel that heard the complaint properly applied the legal principles respecting the union's duty of fair representation under section 37 of the *Code*. That panel pointed out that, in dealing with a duty of fair representation complaint, the Board does not evaluate an employer's work practices, nor does it decide the merits of a bargaining unit member's grievance. The Board focuses instead on the trade union's overall representation process for a bargaining unit member and weighs whether or not the union acted in an arbitrary or discriminatory manner or in bad faith toward that member (paragraphs 5, 6 and 7 of the decision).

[43] Further, it is well established that a member of a bargaining unit does not have an absolute right to arbitration of a grievance and that the union enjoys considerable discretion in this regard. The Board made this clear in *Sheobaran*, 1999 CIRB 10:

> [33] It is well established that an employee does not have an absolute right to arbitration. It is the legitimate function of the union and its representatives to decide how they will deal with a grievance and even if they are wrong, in the absence of unlawful motives or seriously negligent conduct on the union's part, as in the present case, there is no redress available under the *Code*.

[44] The applicant's request for reconsideration of *Cadieux 656* is based primarily on what he alleges were procedural errors committed by the Board in coming to its conclusion that the union had not violated section 37 of the *Code*.

[45] Firstly, the applicant alleges that the Board relied on information contained in the report of its IRO that was not sworn evidence and that was obtained outside the presence of the parties. However, section 16(*c*) of the *Code* permits the Board to receive and accept such evidence and information on oath, affidavit or otherwise as the Board, in its discretion, sees fit, whether or not that evidence would be admissible in court. Section 16(*f*) of the *Code* authorizes the Board to make such inquiries as it deems necessary, and section 16(*k*) gives the Board the power, *inter alia*, to authorize any person to exercise the Board's powers under sections 16(*c*) and (*f*) of the *Code*. Accordingly, the Board was entitled to proceed in the manner it did. The IRO assigned to the case met with the persons affected by the complaint to, among other things, gather information on the technical process followed by the union in handling the applicant's termination grievance. He also met with the applicant. The IRO subsequently produced a report that was sent to all of the parties and they all had the opportunity to file submissions respecting that report. Indeed, the applicant sent the Board a letter relating to the report, titled "This is a reply to your investigation" (translation), which was received by the Board on March 15, 2012.

[46] Secondly, the applicant alleges that there were important contradictions in the evidence relating to his termination grievance, and particularly whether he was given notice of the union meeting at which his grievance was to be considered, that should have caused the Board to conduct an oral hearing. In his submissions, the applicant refers to the Federal Court of Appeal decision in *Grain Services Union (ILWU-Canada)* v. *Freisen*, *supra*, respecting the Board's discretion under section 16.1 of the *Code* not to hold an oral hearing. He submits that, in that decision, the Federal Court of Appeal stated that the Board's discretion not to hold an oral hearing was not absolute. Without casting doubt on that statement, it is nonetheless appropriate to mention that, in that same decision, the Federal Court of Appeal also stated that contradictory evidence in the context of a complaint made under section 37 of the *Code* does not mean that the Board is required to hold an oral hearing. It stated the following in this regard:

> [24] Our Court has also found, in the context of a complaint of unfair representation under section 37 of the *Code*, that the mere fact that evidence is contradictory does not automatically warrant an oral hearing before the Board absent other compelling reasons. Indeed, since many credibility issues will almost unavoidably arise in a labour relations context, section 16.1 of the *Code* would potentially be deprived of effect if it were otherwise interpreted and applied:

*Nadeau* v. *United Steelworkers of America*, 2009 FCA 100, 400 N.R. 246 at para. 6; *Guan* v. *Purolator Courier Ltd.*, 2010 FCA 103 at para. 28; see also in a different legislative context *Vancouver Wharves Ltd.* v. *International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 (F.C.A.)* (1985), 60 N.R. 118.

[47] It should be noted that a very large majority of all complaints made under section 37 of the *Code* before the Board are decided without an oral hearing. Potential complainants are notified of this policy and practice in advance; the Board's standard form for section 37 complaints, which was used by the applicant to file his original complaint, states the following:

> **VII–Hearing**
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> The Board will review and consider all of the material on file, including the submissions of the parties and supporting documentation. There is no requirement for the Board to hold an oral hearing and most often it does not, even if an oral hearing is requested. It is essential that you provide all the material on which you are relying to support your complaint. If you are requesting an oral hearing, please explain why you think it is necessary.

[48] At the time he made his complaint, the applicant did not request that the Board hold an oral hearing in his case. A review of his later pleadings suggests that he misapprehended the Board's role in a duty of fair representation complaint, as he requested an opportunity to provide his version of the events that led to the employer's decision to terminate his employment. The Board's role in a section 37 complaint does not extend to consideration of the merits of a complainant's grievance. As the Board explained in *Bugay*, 1999 CIRB 45:

> [29] In dealing with a section 37 complaint, the Board does not have jurisdiction to examine the merits of an employee's case. The Board's focus is on the union's conduct, our role being to determine whether, in handling the complainant's case or in representing the complainant, the union fulfilled its duty pursuant to section 37 of the *Code* ...

[49] The original panel considered all of the information and submissions in making its decision; it is not a reconsideration panel's role to second-guess the resulting assessment of the facts. In *Terminaux portuaires du Québec Inc.* v. *Association des employeurs maritimes et al. (No. 2)* (1993), 142 N.R. 44 (F.C.A.), the Federal Court of Appeal had to rule on an application for judicial review of a decision made by the Canada Labour Relations Board, the current Board's predecessor, on an application for certification in the longshoring industry. One party argued that the Board had failed to conduct the necessary investigation and to hold a hearing despite the contradictory nature of the parties'

contentions. Although the Court allowed the application for judicial review, it did so for reasons relating to the Board's failure to follow a process for the appointment of an agent to act on behalf of the employers concerned pursuant to section 34 of the *Code*. In addressing the investigation process and the lack of an oral hearing, the Court stated the following:

> [14] The applicant argued that the Board did not make the necessary investigation, did not hold a hearing when the complexity of the facts and the contradictory nature of the parties' contentions required one and did not give reasons for its decision so that the parties could properly understand the basis for it and this court could exercise its superintending function with full knowledge of the facts. Realizing that neither the *Code* nor the case law imposes any particular duty on the Board regarding the conduct and procedure of its investigations (Sections 15(*k*) and (*m*) and 16(*c*) and (*f*) of the *Code*...), counsel for the applicant argued that the Board's failure to do what it was not required to do but was authorized to do and should have done in the circumstances of the case at bar led it to exceed its jurisdiction.
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> [15] This proposition is untenable in fact and in law. The applicant is essentially inviting the court to impose requirements not imposed by the legislation and substitute its own discretion for that of the Board on the ground not that the latter erred in exercising it as it did, but that it erred in not exercising it as it could have done.
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> [16] An investigation was conducted here, though a less elaborate one than when a similar application was considered three years before. The parties were heard, though only by written submissions. Reasons were given for the order, though very brief ones. Clearly, there could have been a more extensive investigation, an oral hearing and detailed reasons, but the Board decided to proceed as it did and I do not see on what basis the court could refuse to approve its procedure.

[50] After reviewing the IRO's report and the applicant's response to it, the Board applied its well-established criteria for determining whether a union has breached its duty of fair representation. The Board ultimately came to the conclusion that the applicant was aware of the democratic process that the union uses to decide whether a grievance will be referred to arbitration, was aware of the meetings at which his grievance was to be considered, and could have participated had he wished to do so. The reconsideration panel is of the view that the contradiction identified by the applicant as being a critical factor in his complaint–whether or not he actually received the email from the union advising him of the meetings at which his grievance was to be considered–was not, in fact, a key difference that required resolution by the Board. Under the union's bylaws, a grievor's participation at such meetings is not obligatory, and the union was entitled to proceed with its consideration of his grievance whether he was present or not.

[51] The Board wishes to point out that, in the documents filed in the original complaint, the union bylaws were provided in English only. The Board translated the relevant bylaws into French in its Reasons for Decision. Article 7(*b*) of the original English version of those bylaws reads as follows:

> 7(*b*) At the last step of the grievance procedure and prior to the membership voting on arbitration, the member will present his case to the Executive Board, orally or in writing, at their regular meeting. Should the member not make a presentation to the Executive Board, the Executive Board will render it=s [*sic*] recommendation based on the evidence on file.

[52] It is clear from this provision that it is not necessary for a member to be present at the meeting during which the union's executive board discusses the manner in which the grievance is to be handled. Hence, it was not mandatory for the applicant to attend the executive board meeting of June 1, 2011. The Board's French translation of the provision in *Cadieux 656* may have led to some confusion in this regard.

[53] In this matter, the union followed the process set out in its bylaws to handle the applicant's termination grievance. The decision as to whether or not to refer the grievance to arbitration ultimately lay with the members of the bargaining unit, which had to vote on it, pursuant to the union's bylaws. Upon weighing the evidence on file, the original panel found that the applicant had known that the meetings relating to his grievance were being held but did not attend. In its decision, the panel pointed out that the union had followed a similar process in regard to referring the applicant's suspension grievance to arbitration.

[54] It is clear that the union handled the applicant's termination grievance in accordance with the procedure applicable to all of its members and that it informed the applicant of the result in a letter sent to him on June 28, 2011. The original panel concluded that the applicant had not convinced it that the union had acted in a manner that was arbitrary, discriminatory or in bad faith toward him, within the meaning of section 37 of the *Code*. The panel's reasoning in this regard is consistent with that which the Board set out in detail in *Misiura*, 2000 CIRB 63 concerning the role of the Board in a complaint under that section of the *Code*:

> [20] The Board's supervisory powers are directed at remedying abuses of a bargaining agent's exclusive representation authority. The Board does not sit in appeal of a union's decision, nor will it substitute its opinion or second-guess the union's assessment of a particular situation.

> Nor is the Board the tribunal of last resort when a complainant does not pursue claims with diligence or address them to the proper forum. It is not because a member is disgruntled over the results of the union's inquiries or the fact that its findings agree with those of the employer that the union has breached its duty of fair representation. The Board's analysis is limited to the union's conduct in reaching a decision. Thus, the complainant must be able to demonstrate persuasively that the union acted in a manner that was arbitrary, discriminatory or in bad faith. In the absence of severe negligence, the Board will not intervene in the union-member relationship.

[55] The last substantive ground raised by the applicant in his request for review of *Cadieux 656* was that the Board should have considered the recording he had provided of the union's June 15, 2011 assembly. He suggests that, by not doing so, the Board had prematurely deprived itself of relevant evidence. In the original proceedings, the union had objected to the introduction of the recording and/or transcripts of the recording. The Board did not formally rule on the union's objection, but it also did not listen to the recording. Although the Board has discretion to accept any evidence it sees fit, there is an inherent concern regarding recordings that are made without the knowledge or consent of the other party. The Board has established a protocol for dealing with surreptitiously recorded evidence (see *D.H.L. International Express Ltd.* (1995), 99 di 126; and 28 CLRBR (2d) 297 (CLRB no.1147)). In this case, the applicant was unable or unwilling to identify the person who made the recording or the circumstances in which it came into his possession. Consequently, it was not improper for the Board to refuse to consider the recording.

[56] For all of the foregoing reasons, the Board finds that the applicant has not provided sufficient grounds to persuade the Board to reconsider the decision in *Cadieux 656*. Accordingly, the reconsideration application is dismissed.

[57] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Louise Fecteau
Vice-Chairperson

William G. McMurray
Vice-Chairperson